

SERVED: January 20, 1994

NTSB Order No. EA-4058

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of January, 1994

_____)	
HOWARD J. FULLER, JR. and)	
PATRICIA CLEMENCE,)	
)	
Applicants,)	
)	
v.)	
)	Dockets 130-EAJA-SE-12106
DAVID R. HINSON,)	and 132-EAJA-SE-12107
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Applicants have appealed from a written order of Administrative Law Judge Jimmy N. Coffman denying their application for an award of attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.¹ The law judge concluded that -- despite his dismissal on October 26,

¹ A copy of the law judge's order is attached to this Opinion and Order.

1991, (at the conclusion of a three-day evidentiary hearing) of the emergency orders revoking the airframe rating of applicant Fuller's mechanic certificate and suspending the airworthiness certificate of the subject helicopter owned by applicant Clemence -- the Administrator's case had a reasonable basis in fact and law and, thus, the FAA's position in this litigation was substantially justified within the meaning of the EAJA. Because we agree with this conclusion, we dismiss applicants' appeal, and affirm the law judge's order denying the application for an award.

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1). To find that the Administrator was substantially justified we must find his position reasonable in fact and law, i.e., that the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory. Application of U.S. Jet, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). This standard is less stringent than that applied at the merits phase of the proceeding, where the Administrator must prove his case by a preponderance of the reliable, probative, and substantial evidence. Accordingly, the FAA's failure to prevail on the merits does not preclude a finding that its position was

nonetheless substantially justified under the EAJA. See Application of U.S. Jet at 3; Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986).

The Administrator's position at the hearing, essentially, was that mechanic Fuller's remarking of the manifold pressure gauge and installation of an auxiliary fuel tank on a helicopter owned by applicant Clemence and her husband² violated a number of safety regulations³ and rendered the aircraft unairworthy.⁴ This position had a reasonable basis in both fact and law.

Regarding the remarking of the manifold pressure gauge, Fuller admitted that he painted a red line on the gauge somewhat to the right of the original line, which was still visible at 24.1 (the appropriate limit specified in the "Limitations" section of the flight manual for a Robinson R22 Alpha model helicopter such as this one). (Exhibit R-13.) The new line appeared to be located at approximately 25.2, the limit specified

² Mr. Clemence, while a respondent below, did not join in the EAJA application.

³ Specifically, mechanic Fuller was charged with violations of 14 C.F.R. §§ 43.9(a)(4), 43.5(b), 43.5(c), 43.13(a), 43.13(b), and 43.15(a)(1).

⁴ The Administrator took the position that, due to these alterations, the helicopter did not conform to its type certificate because the type certificate data sheet (TCDS) did not contemplate installation of an auxiliary fuel tank on this serial numbered helicopter, or a change in the markings on the manifold pressure gauge. We note that the emergency suspension of the helicopter's airworthiness certificate was also supported by the fact that an airworthiness certificate is effective only so long as maintenance and alterations are performed in accordance with applicable regulations. 14 C.F.R. § 21.181.

in the flight manual for a Beta model helicopter. (Id., Exhibit A-1.) Although Fuller claimed at the hearing that he made no attempt to remove the original line, and only painted the new one on to accommodate the distorted view that a short pilot like Mrs. Clemence would have of that gauge from the right pilot seat, the Administrator could reasonably conclude that the remarking was in fact part of an impermissible attempt to alter the operating limitations of the aircraft. Indeed, this would be consistent with Fuller's logbook entry describing this and other work accomplished on August 1, 1988, as a modification of the aircraft from an Alpha to a Beta configuration.⁵

As for Fuller's installation of an auxiliary fuel tank on the helicopter, the Administrator also had a reasonable basis for his position that this constituted a major alteration, and that in the absence of published approved data to guide this alteration (as required by 14 C.F.R. 43.13(a)), or the submission of a Form 337 to the FAA (as required by 14 C.F.R. 43.5(b) and 43.9(a)(4)), the alteration was improper and the aircraft was unairworthy.⁶

⁵ Fuller's logbook entry was admitted as Exhibit A-2 (*italics added*):

8-1-88 802.0 Modified aircraft to "beta" configuration. Installed large oil cooler kit No. KI42, cabin heat system kit No. KI20-2. Installed Aux. fuel tank assy B-043-1. Cowling modified per RHC R22 IPC figure 9-18. *Remarked M.A.P. indicator.* New empty weight 867.65. EWCG 104.2. Moment 90434.0.
/s/ Howard J. Fuller, Jr. IA 1695670

⁶ In order to be airworthy, an aircraft must conform to its type certificate, and be in a condition for safe operation.

Although the type certificate data sheet (TCDS) does refer to an "optional" auxiliary fuel tank for the R22 Alpha model under the heading of "Fuel Capacity" (Exhibit R-6), the Administrator argued that this alone does not authorize such an installation without approved data or a Form 337. Furthermore, the Administrator maintained, reasonably we think, that the TCDS must be considered in conjunction with the individual aircraft's equipment list which, in this case, does not list an auxiliary fuel tank. (Exhibit R-4.) The Administrator also relied on the Robinson Helicopter illustrated parts catalog (Exhibit A-3), which notes that the auxiliary fuel system is available only for aircraft with serial numbers of 457 and higher. The helicopter here at issue is serial number 438.

The head of the FAA's engineering certification office indicated to the investigating inspector in this case that the installation of an auxiliary fuel tank on this helicopter constituted a major alteration requiring approved data which was not available to the public. (Tr. 124, 202.) Finally, the President of Robinson Helicopters himself confirmed, in a personally signed letter to the investigating inspector, that the company had "not provided a kit nor approved data for the installation of auxiliary fuel tanks in . . . serial number aircraft [prior to 457] because the structural changes were to [sic] extensive." (Exhibit A-4.)

(..continued)

Administrator v. Doppes, 5 NTSB 50 (1985), citing 49 U.S.C. 1423(c).

In defense of the auxiliary fuel tank installation, applicants presented testimony from Fuller, Clemence, and an FAA designated engineering representative who testified that he evaluated the helicopter to determine its conformance with applicable requirements, and that -- despite indications to the contrary in documents relied on by the Administrator -- this helicopter was among those which were modified at the Robinson factory to accept the auxiliary fuel tank without making further structural changes in the field. It was their position that installation of the tank was a minor, not a major, alteration. The law judge's reversal of the emergency orders was based primarily on his acceptance of this testimony.

In our view, the Administrator had adequate information to support the underlying basis for his revocation orders.⁷ We

⁷ Although there were additional allegations in those orders which were not pursued at the hearing, we view those allegations as relatively minor in comparison to the two discussed above, and their inclusion in the orders do not render the Administrator's position unreasonable or substantially unjustified.

Specifically, the Administrator alleged in the order suspending the aircraft's airworthiness certificate that it was missing its equipment list, its weight and balance sheet, and certain required placards. Although these allegations were not emphasized at the hearing by the Administrator, we note that Mr. Clemence testified that he keeps certain important documents related to his helicopter with him, rather than with the helicopter, suggesting that the charges could have been substantiated. (Tr. 299.) The order also alleged that Fuller's modification of the cowling (as detailed in his logbook entry of August 1, 1988) constituted an impermissible major alteration in that there was no approved data or Form 337 filed for the repair.

Although not pursued at the hearing, we note, as did the law judge, that included in the list of major alterations in Appendix A to Part 43, at (a)(1)(vii), is "[a]ll alterations of . . . [e]lements of an airframe including . . . [the] cowling." We think this provides a reasonable basis for including the allegation in the order.

recognize that the Administrator deleted several allegations of maintenance discrepancies and improper alteration listed in the original order suspending the helicopter's airworthiness certificate, after it became apparent during discovery that the listed items were not improper after all. However, this does not detract from the reasonableness of the remaining charges. To the contrary, we think it suggests the Administrator was proceeding in good faith under a reasonable belief that those charges were justified.

Nor was the decision to pursue these enforcement actions rendered any less reasonable because the law judge ultimately credited Fuller's explanation for his remarking of the manifold pressure gauge, and credited the expert testimony offered by Fuller and the Clemences indicating that the installation of the auxiliary fuel tank was not in fact a major alteration.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicants' appeal is denied; and
2. The law judge's order denying the application for an EAJA award is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.